In the Supreme Court of the United States

October Term, 1970

No. ~~1331~~ 70-78

AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, an unincoporated association formed by and under the supervision of the Secretary of the Department of the Interior pursuant to Public Law 83-671 (25 U.S.C. §§ 677-677aa) composed of 490 so-called "mixed-blood" members of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, suing on its own behalf and as representative for and on behalf of its 490 members and their heirs and legal representatives as a class; and the 490 so-called "mixed-blood" members of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, individually and as an identifiable Indian group or band,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

ANITA REYOS, *et al.*,

Petitioners,

vs.

FIRST SECURITY BANK OF UTAH, N.A., UNITED STATES OF AMERICA, JOHN B. GALE AND VERL HASLEM,

Respondents.

BRIEF OF FIRST SECURITY BANK OF UTAH, N.A. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioners' statement of the case is inadequate and inaccurate and cannot be patched up piecemeal. This de-

fendant, First Security Bank of Utah, N.A., prefers to state the case as it involves this defendant in the language of the opinion of the United States Court of Appeals, Tenth Circuit, in the case of *Reyos v. United States*, et al, 431 F.2d 1337.

"SETH, Circuit Judge.

"These suits were commenced by eighty-five individuals with whom the United States originally had full trust relationship as Indians of the Tribe of the Uintah and Ouray Reservation in Utah. Of this group of plaintiffs twelve individuals were selected by the parties as the ones whose cases would be tried first as test cases. These are referred to as the 'designated' plaintiffs and are the appellees herein.

"An Act of Congress directed that the federal trust relationship with the mixed-bloods of the Tribe be terminated, and the tribal property be divided between the mixed-blood and the full-blood groups. This is referred to as 'termination.' All plaintiffs belonged to the group of some 490 individuals designated by statute as the mixed-bloods of the Tribe.

"The termination statute (68 Stat. 868, 25 U.S.C. §§ 677-677aa) permitted the mixed-blood group to form associations or corporations to handle some of the property difficult or impossible to distribute to individuals which was allocated to the mixed-blood group, and for matters of general concern to this group. One such corporation so formed was the Ute Distribution Corporation, the stock of which and the stockholders are concerned in these suits.

"One type of property which the termination statute stated was not to be distributed to individuals was the gas, oil and mineral interests. Upon division of the tribal property, a portion

thereof in undivided interests was allocated to the mixed-blood group. The Ute Distribution Corporation was organized to 'handle' this interest of the mixed-bloods jointly with the Tribal Committee which had authority over the full-bloods' share. It was also organized to distribute the group's portion of unliquidated claims against the United States.

"Ten shares of stock in the UDC were issued to each person in the mixed-blood group, and distributions or dividends were paid to the stockholders from time to time. The defendant bank entered into a contract with this corporation to act as transfer agent and to provide to it some record keeping and related services. In addition, the bank, under the termination statute, was authorized to act as trustee of express trusts for mixed-bloods who, in the opinion of the Secretary of the Interior, needed such help.

"The individual defendants Gale and Haslem were assistant managers of a facility of the bank located in an area where a number of the mixed-bloods lived, and who dealt directly with some of the plaintiffs in the sale or transfer of their stock.

"The plaintiffs were stockholders of the UDC who sold shares of their stock to non-Indians. The bank facilities and services were used in connection with these sales or some of them. The causes of action against the bank alleged a breach of the bank's duty arising from the agreement with the UDC and from its participation in the sales of stock. The action against the bank is also based on Regulation 10b-5 of the Securities and Exchange Commission. The causes alleged against the individual defendants Gale and Haslem are based solely on this Regulation.

"Some time after these suits were filed the complaints were amended to include a cause of action against the United States under the Tort

Claims Act. This cause alleged a breach of duty by the Secretary of the Interior and the local officials of the Bureau of Indian Affairs in connection with the transfer of the shares of stock.

"The trial court, in some one hundred pages of findings and conclusions, found the defendant bank and defendants Gale and Haslem liable for damages to each of the twelve plaintiffs whose cases were selected as test cases for all sales made by them. The United States was found liable only as to some of the plaintiffs. The trial court used the figure of $1500 per share as a value for computing damages.

* * *

"Of particular significance to the issues on this appeal is a provision in the termination statute giving the right to the mixed-blood members to dispose of property they received by distribution. This section states:

" 'Any member of the mixed-blood group may dispose of his interest in the tribal assets prior to termination of Federal supervision, subject to the approval of the Secretary. In the event a member of the mixed-blood group determines to dispose of his interest in any of said real property at any time within ten years from August 27, 1954, he shall first offer it to the members of the tribe, and no sale of any interest, prior to termination of Federal supervision, shall be authorized without such offer to said members of the tribe in such form as may be approved by the Secretary. After termination of Federal supervision the requirement of such offer, in form to be approved by the Secretary, shall be a covenant to run with the land for said ten-year period, and shall be expressly provided in any patent or deed issued prior to the expiration of said period.' (25 U.S.C. § 677n).

"See also the Secretary's Regulations at 25 C.F.R. § 243.8.

"The essential elements of the quoted section were incorporated in the Articles of Incorporation of the Ute Distribution Corporation to govern the sale of the corporate shares. Thus in the event that a stockholder of the Ute Distribution Corporation desired to sell his stock before August 27, 1964, it was necessary that it first be offered for sale at a stated price to the Tribe or to the members of the Tribe. The procedures and the documents necessary to carry out this provision were arranged for and agreed upon by the local representative of the Bureau of Indian Affairs, by the defendant bank as transfer agent, and by the UDC.

"Much of the testimony during the trial concerned the execution and delivery of various documents which were required to carry out this requirement of the corporate charter. This provision can best be referred to as a right of refusal in the members of the Tribe or the Tribe. It expired on August 27, 1964.

* * *

"The legal relationships and the business relationships between the plaintiffs and the defendant bank, and with the Ute Distribution Corporation were determined basically and initially by the contract which had been entered into between the bank and the UDC. This agreement was modified somewhat from time to time in practice. The contract was entered into in 1958, but the principal issues with which we are concerned took place in the years 1963, 1964, and 1965.

"The principal purpose of the contract between the bank and the UDC was to have the bank provide stock transfer services, to do the corporate record keeping, the corporate accounting, and handle distributions or dividends.

"Of particular consequence in this case was the provision that the bank would act as stock transfer

agent for the corporation, and would also assist the corporation in the conduct of its business. The record indicates that it was expected that the bank in the performance of its duties would also accommodate or provide stock transfer services for the individual stockholders of the corporation. This was demonstrated by the fact that the bank was to provide facilities and personnel at Roosevelt, Utah, in an area where many mixed-bloods resided, in order to accommodate transfers of stock. The trial court found that the Roosevelt office of the bank was maintained in part '* * * for the purpose of facilitating and assisting mixed-bloods in the transfer of Ute Distribution Corporation stock. * * *'

"It is apparent that the transfers of stock of this particular corporation would be somewhat complicated by the existence of the right of refusal in the members of the Tribe, which has been hereinabove described. As indicated, this right of refusal necessitated the creation of forms which would demonstrate that the right of refusal had been complied with in order that the bank could proceed with its customary duties as transfer agent.

"The contract provided for direct compensation to the bank as transfer agent. It is also apparent from the record that the bank was seeking individual accounts from the tribal members and others. It must be assumed that the parties contemplated the usual notary fees and other ordinary fees incident to the transfers of shares.

* * *

"The stock transfer contract contained no provision whereby the bank was to discourage stockholders from selling or transferring their shares; instead the procedure which was established was to facilitate such transfers and located at a place convenient to prospective transferees.

"As the contract was put into practice, the bank retained the stock certificates of the individuals, and the transfers were handled by stock powers in the usual way. The record shows that the certificates were so retained by the bank in order to prevent their loss by the individual stockholders with the attendant problems to the corporation and the transfer agent in replacing lost certificates. As will be hereinafter mentioned, the stock certificates bore a warning or admonition to the owners to be careful in selling them as they were of undetermined value. Since the stockholders did not have possession of the certificates, they did not have an opportunity to read this warning.

* * *

"It would appear that the trial court placed considerable reliance in reaching its conclusion on the asserted inaccuracies in the affidavits executed by the plaintiffs concerning their ultmiate sales of the shares. However, the bank or the government had no duty as to these plaintiffs to see that they executed affidavites that reflected the true transaction. Furthermore the affidavits were executed in connection with the right of refusal in which, as indicated above, the defendants had no interest. It is difficult to see how they can complain of inaccuracies in their own affidavits."

ARGUMENT

Pursuant to the provisions of Rule 19 of the rules of this Court, this defendant submits that petitioner's petition for certiorari should be denied on the following grounds:

I. The decision of the Tenth Circuit is not in conflict with the decision of any other circuit.

II. The Circuit did not decide an important question of federal law involving the securities laws "which has not been but should be settled by this Court."

III. The decision of the Tenth Circuit is not in conflict with any applicable decision of this Court.

IV. The Circuit has not ". . . so departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

V. There is no other reason for the Court to exercise its discretion in favor of entertaining consideration of this petition for certiorari.

I. THE DECISION OF THE TENTH CIRCUIT IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT.

The petitioners' brief does not reveal any such conflict. Petitioners' brief implies that the Court ignored *Kardon v. National Gypsum Co.*, 73 F.Supp. 798 (E.D. Penn. 1947) which holds that "10b-5 creates a duty in a securities transaction" giving rise to a civil action.

Nowhere in *Reyos v. United States*, et al, does the Court ignore or deny that elementary principle. On the contrary, on page 1347 of the opinion, the Court cites a long string of cases demonstrating its acknowledgement of the fact that 10b-5 does give rise to a civil action.

What the Tenth Circuit determined was that the Bank simply did not violate 10b-5.

Consequently, the *Kardon* case represents no conflict with the *Reyos* case.

In a second attempt to show a conflict as between circuits, petitioners' brief states on page 25:

> "The Court of Appeals conclusion that performance of ministerial banking functions by the bank officers is not a 'participation' of the type contemplated by the statute and Rule is squarely in conflict with the Court of Appeals for the Seventh Circuit decision in Carroll v. First National Bank, 413 F.2d 353 (7th Cir. 1969) cert. denied 396 U.S. 1003."

Respondent submits that the *Carroll* case is in no sense analogous to the case at bar. In that case the plaintiffs were securities dealers. The issue was whether or not a cause of action under 10b-5 had been stated in a complaint against the defendant bank. According to the Court, the allegations of the complaint were as follows:

> "The amended complaint charges that the Bank was a 'main participant' in a scheme or conspiracy to defraud plaintiff securities dealers 'in connection with the purchase and sale of securities' by means of materially false representations, untrue statements of material facts, and the making of misleading statements. Of the 23 individual defendants presently in the case, five were officers or directors of the Bank and two were employees of plaintiffs. All seven were described as main participants."

The twenty-three individual defendants made certain purchases of stock and the Court goes on to say in its opinion:

> "The purchases were C.O.D., requiring full cash payment only upon delivery of the securities to the bank designated by the purchaser, in this case the defendant Bank. The amended complaint alleges that as the relevant settlement drafts were directed to the Bank, the Bank 'received and held

[each of] the drafts and accompanying securities, without paying the draft or returning it, for as long as possible.' If the Bank were questioned about non-payment, the Bank, its officers and two defendant employees of the Bank 'obtained additional time by making statements and giving assurances that arrangements for payment were unavoidably delayed or were in progress, and that payment would be forthcoming,' even though these statements were untrue and misleading. Other purported wrongdoing of the Bank, its officers and certain of its employees is detailed in the amended complaint.

"Finally, the Bank, its chairman, its president, one of its vice presidents, and one of its assistant vice presidents are said to have assisted two of plaintiffs' employees, now defendants, in this scheme by arranging for persons other than the designated customers to pay the drafts and purchase the securities, without the knowledge of plaintiffs, in order to conceal the participants' inability to finance the purchase orders which they placed. It is alleged that the scheme collapsed in a declining market for the accumulated securities, resulting in an inability to prolong the shoestring purchases. In May 1966, the plaintiffs discovered that the Bank was holding a large number of uncollectible drafts drawn by plaintiffs and payable at the Bank for purchases of securities from plaintiffs on behalf of participants in the scheme. The uncollectibility of these drafts is said to have resulted in large losses to Link and the insolvency of Siegler."

On page 357, the Court held as follows:

"We have recently reiterated that frauds 'in connection with' sales of securities are sufficient to invoke the jurisdiction of the 1934 Act and Rule 10b-5 (Buttrey v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 410 F.2d 135 (7th Cir.

> 1969) so that the Bank's participation in this credit bubble fraud sufficiently states a claim against it under Section 10(b) and Rule 10b15. Although the Bank may have neither bought nor sold securities for its own account, it was in a unique position to obtain the necessary time during which it was hoped that the value in the purchased securities would rise sufficiently to allow the participants in the scheme to use them in financing still further purchases. Moreover, as alleged in the amended complaint, the Bank was able to conceal the precarious nature of the speculative purchases by arranging for undisclosed or fictitious persons to bail out certain overdue transactions. Since the Bank was charged with being an aider and abettor in the fraud, it must now meet the merits of that charge."

Obviously the facts alleged in that case bear no relationship whatsoever to those found in the case at bar. According to the complaint, top bank officers, acting as bank officers in the scope of their employment, actively and knowingly participated in a scheme to defraud, to-wit, a scheme to create a "credit bubble" which the bank's officers and friends could use to turn a quick profit. That case did not involve ministerial functions, but deliberate connivance to accomplish a fraudulent end.

The Tenth Circuit did not hold that 10b-5 does not apply to banking institutions. It merely held that the defendant bank did not violate 10b-5. Consequently, the *Carroll* case does not constitute any conflict between circuits.

Petitioners' counsel in his brief contends that the Bank was in the position of a fiduciary to the stockholders of Ute Distribution Corporation, even though the Bank was only a transfer agent and at most "business

advisor" to the Ute Distribution Corporation. Counsel further alleges that the Tenth Circuit in failing to find that fiduciary relationship in the *Reyos* case rendered a decision inconsistent with the decisions of other circuits.

In an attempt to demonstrate inconsistency, petitioners' brief cites *Securities and Exchange Com'n v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2nd Cir. 1968). That case is one involving misconduct in connection with purchase and sale of stock of a corporation perpetrated by "insiders." That case is obviously not analogous in any sense. Of course, directors and officers of the Ute Distribution Corporation would have been fiduciaries to the mixed-blood stockholders, but the defendant bank was not an officer or director of the Ute Distribution Corporation and neither were any of the Bank's agents or employees. Accordingly, there is no conflict posed by the *Texas Gulf Sulphur* case.

Petitioners' counsel also cites *Kohler v. Kohler*, 319 F.2d 634 (7th Cir. 1964), purportedly to indicate a conflict on the fiduciary issue.

This is a strange case for petitioners to cite inasmuch as its holding, to the limited extent that it is analogous, is favorable to the bank. In that case:

> "Plaintiff sought damages arising out of a sale of Kohler Co. common stock which he sold to the company for $115 per share on February 20, 1953. In his complaint plaintiff alleged that he was induced to sell his stock by 'misrepresentation, half truths, and omissions' of defendants and as a result sold his stock for at least $10 per share less than its 'actual' or 'fair market' value. He contended that defendants violated Section 10(b) of the Securities Exchange Act of 1934, 15

U.S.C. § 78j(b), and Rule X-10b-5 of the Securities and Exchange Commission, 17 C.F.R. 240.10b-5, in that their conduct constituted a breach of their duties as 'fiduciaries' and 'insiders' to fully and accurately disclose all facts material to the value of his Kohler Co. stock."

The court held that there was no breach of duty on the part of an accountant retained to negotiate the sale of stock in failing to volunteer details of a pension plan or of an accounting method of how annuities funding was treated on the books, even though a different method, if adopted, would have increased the book value of the company. In that case then, the Court did not find a fiduciary relationship so there was certainly no conflict between that case and the *Reyos* case.

Petitioners attempt to demonstrate a conflict between the Tenth Circuit and the Second Circuit on the issue of privity by citing again the *Texas Gulf Sulphur* case. Petitioners incorrectly contend that the Tenth Circuit decision required privity in order to sustain liability. The Tenth Circuit decision was not based on the issue of lack of privity at all. It was based on a simple lack of duty of the bank officer to become an investment advisor to a stockholder when all he was doing was notarizing an affidavit or guaranteeing a signature.

Under the "Privity" subheading of petitioners' brief, counsel quotes from the *Texas Gulf Sulphur* case again and his quote reveals the inapplicability of that case. The quote is:

"Congress when it used to phrase 'in connection with the purchase or sale of any security' intended only that the device employed, whatever it might be, be of a sort that would cause reasonable in-

vestors to rely thereon, and, in connection therewith, so relying, cause them to purchase or sell a corporation's securities."

The problem involved in the *Texas Gulf Sulphur* case was centered upon the newspaper publication of misleading information regarding certain exploration activities of the corporation. In that case the Court further said:

> ". . . When materially misleading corporate statements or deceptive insider activities have been uncovered, courts should broadly construe phrase 'in connection with purchase or sale of any security' . . ."

The Court in the *Texas Gulf Sulphur* case is talking about reliance on false representations. There is no evidence anywhere in the *Reyos* case that the petitioners relied on any representations, misleading, false or otherwise, made by Bank's agents in connection with the purchase and sale of the stock. The trial court's Findings of Fact do not set forth any false representations on the part of Gale or Haslem, the Bank's assistant managers in Roosevelt. The worst that is attributed to them is a nondisclosure of the price at which the stock could have been sold to other buyers.

It is clear that the Tenth Circuit decision was not based on the finding of lack of "privity" because it is recognized by the Court that defendants Gale and Haslem, officers of the Bank, *were* buyers for themselves, so if their conduct was attributable to the Bank on the theory of respondeat superior, as the Court found, there *was* privity with respect to the shares purchased by Gale and Haslem, and therefore the Circuit could not rule that "no privity" meant "no liability."

For that reason also the other two cases cited by petitioners supporting his privity in conflict point, *Brennan v. Midwestern United Life Insurance Co.*, 415 F.2d 147 (7th Cir. 1969) and *Buttry v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 410 F.2d 135 (7th Cir. 1969) are likewise not applicable.

II. THE CIRCUIT DID NOT DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW INVOLVING THE SECURITIES LAWS "WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT."

Petitioners' brief does not purport to prove that the Tenth Circuit in the *Reyos* case decided any important question of federal law which has not been but should be settled by this Court.

III. THE DECISION OF THE TENTH CIRCUIT IS NOT IN CONFLICT WITH ANY APPLICABLE DECISION OF THIS COURT.

Petitioners' counsel complains that the Circuit failed to find the Bank a fiduciary and claims that it should have in light of this Court's ruling in *Securities and Exchange Commission v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963). *The Capital Gains Research* case is not analogous to the *Reyos* case and does not present any conflict. According to this Court's summary, the *Capital Gains Research* case was an action by the Securities and Exchange Commission "to obtain an injunction compelling a registered investment advisor to disclose to his clients a practice of purchasing shares of

security for his own account shortly before recommending that security for long term investment and then immediately selling the shares at a profit upon the rise in the market price following the recommendation. The action was based on § 206(2) of the Investment Advisers Act (15 USC § 80b-6(2)), prohibiting an investment adviser from engaging in any practice which 'operates as a fraud or deceit upon any client or prospective client.'"

The petitioners, by the argument in this section of their brief, ask the Court to find a transfer agent (Bank) of a corporation (Ute Distribution Corporation) to be a fiduciary of the individual stockholders of the corporation to such an extent that the transfer agent was not supposed to transfer shares of stock until it had ascertained that the stockholder had received a fair price. Trying to make a transfer agent a guardian of a stockholder to see that he gets a fair price is certainly not analogous to preventing an investment advisor from deceiving his client. Trying to make a stock transfer agent-stockholder relationship analogous to an investment advisor-client relationship is specious.

IV. THE CIRCUIT HAS NOT ". . . SO DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS . . . AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION."

The petitioners' brief does not purport to set forth any arguments to the effect that the Tenth Circuit "so departed."

V. THERE IS NO OTHER REASON FOR THE COURT TO EXERCISE ITS DISCRETION IN FAVOR OF ENTERTAINING CONSIDERATION OF THIS PETITION FOR CERTIORARI.

So ar as the writer is able to ascertain, the petitioners do not set forth any grounds justifying certiorari other than those discussed above.

CONCLUSION

For the reasons stated above, petitioners' request for certiorari should be denied.

Respectfully submitted

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